SUBMITTED

# TRANSCRIPT OF RECORD

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 348

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

vs.

THE MINNESOTA MUTUAL INVESTMENT COMPANY

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO

FILED APRIL 6, 1926

(31011)

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[File endorsement omitted.]

In United States District Court, District of Colorado

THE MINNESOTA MUTUAL INVESTMENT COMPANY, a Corporation, plaintiff

vs.

THE UNITED STATES OF AMERICA, defendant

*Bill of Complaint*

Filed Sept. 20, 1923

Comes now the plaintiff and, complaining of the defendant, alleges:

I

2 That plaintiff now is, and at all times hereinafter mentioned, was, a corporation organized and existing under and by virtue of the laws of the State of South Dakota, and permitted to do business in the State of Colorado by compliance with the laws of said State in that behalf provided.

II

That this cause does not involve an amount exceeding the sum of ten thousand dollars ($10,000.00) and is founded upon a regulation of an executive department of the United States Government and the cause of action is within the jurisdiction of this court, as provided in paragraph 20th of section 24 of the judiciary act of Congress, approved March 3, 1911.

III

Plaintiff further alleges that in a cause lately pending in the United States District Court within and for the District of Colorado, wherein the Minnesota Mutual Investment Company, this plaintiff, was plaintiff and Victor C. McGirr et al. were defendants, Cause No. 6720, such proceedings were had that the plaintiff herein was required to and it did on the 17th day of June, 1918, deposit in the registry of this court the sum of $15,143.92. That the clerk of this court did immediately deposit the said sum of money in the First National Bank, a banking house in the city of 3 Denver, Colorado, and theretofore designated by the court as one of the depositaries of said court and said sum of money remained in said bank to the credit of said court until the 6th day of May, 1920, when the same was returned and paid to plaintiff herein.

That during all of said period of time the said bank paid interest thereon at the rate of 2% per annum, and paid same semiannually.

IV

Plaintiff further alleges that for a long series of years such interest so paid by the said depositary was added to the deposit for the benefit of the party to whom said deposit belonged but that shortly before the deposit of the above sum of money, as plaintiff is informed and believes, and so charges the fact to be, the Secretary of the Treasury by executive order required all depositaries of court funds to pay all sums of interest to the Treasurer of the United States and that the said bank did pay to the United States and the United States did receive the sum of 2% upon said sum of $15,143.92 semiannually from June 18, 1917, to the 6th day of May, 1920, in accordance with said executive order.

V

That the United States of America was not interested in the said sum of money so deposited, had no right, title, or interest
4 therein directly or indirectly, and the said interest so paid to the United States of America was and is the property of the plaintiff herein, and was received by the United States of America for the use and benefit of plaintiff.

Wherefore plaintiff prays judgment in the sum of $571.26, for costs of this action and such other and further relief as to the court shall seem meet.

EDWIN H. PARK,
*Attorney for Plaintiff.*

[*Duly sworn to by Edwin H. Park. Jurat omitted in printing.*]

5 [Affidavit of service, filed Sept. 20, 1923, omitted in printing.]

6 In United States District Court

[File endorsement omitted.]

[Title omitted.]

*Demurrer*

Filed Nov. 30, 1923

7 Comes now the defendant above named, by Granby Hillyer, United States attorney for the District of Colorado, who is acting herein in its behalf by authority of the Attorney General of the United States of America, and demurs to the complaint heretofore filed herein on the following grounds:

First. That it appears upon the face of the complaint that it does not state facts sufficient to constitute a cause of action against the defendant.

Second. That it appears upon the face of the complaint that the court has no jurisdiction of the subject of the action.

GRANBY HILLYER,
*United States Attorney for the District of Colorado.*
JOHN A. MCCANN,
*Assistant United States Attorney for the District of Colorado.*

8 In United States District Court

[Title omitted.]

*Order overruling demurrer*

July 31, 1924

The demurrer to the complaint herein having heretofore come on to be heard and having been argued by Edwin H. Park, Esquire, as attorney for the plaintiff, and by John A. McCann, Esquire, assistant district attorney, as attorney for the defendant; and having been taken under advisement, and the court having considered the same and being now fully advised in the premises;

It seemeth to the court now here that the complaint herein is sufficient in law to be answered unto, and so the said demurrer is hereby overruled.

9 Thereupon it is ordered by the court that the defendant answer the complaint herein within thirty (30) days from this day.

In United States District Court

[File endorsement omitted.]
[Title omitted.]

*Answer*

Filed Nov. 8, 1924

Comes now the United States of America, defendant in the above-entitled action, by its attorneys, George Stephan, United States attorney for the District of Colorado, and John A. McCann, assistant United States attorney for the District of Colorado, and

10 in answer to the complaint herein:

I

As to the allegations contained in paragraph numbered "I" of the complaint, defendant alleges that it has not and can not obtain sufficient knowledge or information upon which to base a belief and, therefore, denies same.

## II

As to the allegations in paragraph numbered "II" of the complaint, the defendant admits that this cause does not involve an amount exceeding the sum of ten thousand dollars ($10,000.00); and the defendant denies that the alleged cause of action set forth in the complaint is within the jurisdiction of the court.

Defendant denies each and every allegation contained in said paragraph "II" of the complaint not specifically herein admitted.

## III

Defendant admits that in a cause lately pending in the District Court of the United States for the District of Colorado, wherein the Minnesota Mutual Investment Company (this plaintiff) was plaintiff and Victor C. McGirr, et al., were defendants (being case numbered 6720 in this court) such proceedings were had that the plaintiff herein was required to and did, on the 17th day of June, 1918, deposit in the registry of this court the sum of $15,-
11 143.92, which sum was thereupon immediately deposited by the clerk of the court in the First National Bank, a banking house in the city and county of Denver, in the State of Colorado, to the credit of said court, there remaining as such credit until the 6th day of May, 1920, when the same was returned and paid to the plaintiff herein.

Defendant admits that the court purported to designate the said bank as one of the depositaries of said court, but avers that, in making such designation, the court did not, and, under the law of the land, could not, alter, affect, annul, or set aside the right of the defendant herein, under any contract entered into by said defendant with said bank as a depositary of the United States designated as such by the Secretary of the Treasury, to collect, receive, and take into possession, any and all interest provided for in, made payable to, and paid or payable to said defendant, under and by virtue of said contract, on monies paid into court in causes pending therein and deposited in such designated depositary of the United States by the clerk of said court; and the defendant further avers that the purported designation aforesaid of the said court, in manner and form as made, was, under the facts of this case, ineffective, void, and made without warrant and authority of law.

12 Admits that during all of the period of time between the 17th day of June, 1918, to the 6th day of May, 1920, both inclusive, the said bank paid interest on the said sum at the rate of 2% per annum and paid the same semiannually to the Treasurer of the United States.

Denies each and every allegation contained in said paragraph "III" of the complaint not specifically herein admitted.

## IV

Defendant has no knowledge or information upon which to base a belief and, therefore, denies the allegation in paragraph numbered IV that for a long series of years such interest so paid by the depositary was added to the deposit for the benefit of the party to whom said deposit belonged.

Defendant admits that the said bank paid to the United States and the United States did receive, through the Treasurer of the United States, the sum of 2% per annum upon said sum of $15,143.92 in semiannual payments from June 17, 1918, to the 6th day of May, 1920, by virtue of a contract entered into between the defendant and said bank.

Defendant denies each and every allegation contained in said paragraph "IV" of the complaint not specifically herein admitted.

13

## V

In answer to the allegations contained in paragraph numbered V of the complaint defendant alleges that on or about the 9th day of May, A. D. 1913, the United States of America, by its proper officer and officers, and the said the First National Bank of Denver, Colorado, through its proper officer and officers, entered into a contract concerning the payment of interest upon all Government deposits, including court funds, carried with the bank by virtue of said designation as a depositary of the United States, under the rules and regulations theretofore promulgated and published by the Secretary of the Treasury under and by virtue of the authority conferred upon him by the laws of the United States.

Defendant further alleges that said contract consisted of an offer made on behalf of the defendant, by its proper officer and officers, on or about the first day of May, A. D. 1913, and contained in a letter bearing date, the first day of May, A. D. 1913, then and there in words and figures substantially as set forth in the copy of the said letter annexed to, and made a part of this answer, and denominated Exhibit "I" (reference to which is hereby made for greater certainty), and an acceptance of said offer by the said depositary, the First National Bank of Denver, Colorado, on or about the 9th day of May, A. D. 1913, by letter signed by one A. V. Hunter,

14 then president of the said bank, and regularly transmitted to the defendant herein, through its proper officer and officers, and which said letter is attached to and made a part of this answer and is denominated Exhibit "II," reference to which exhibit is hereby made for greater certainty.

Defendant further alleges that sums aggregating $571.26, being the amount set forth in paragraph "V" of the complaint, were paid to the defendant herein by the said the First National Bank of Denver, Colorado, under and by virtue of the said contract above set forth.

Defendant further alleges that in consideration for the payment by the said bank to the defendant of the said sums aggregating $571.26 and other like payments, the defendant (1) allowed the said bank the use of all Government deposits held on deposit therein under and by virtue of the terms of the said contract; (2) allowed the said bank the opportunity of obtaining the prestige and advertising connected with the handling of such Government deposits; (3) kept safe in its custody the collateral security pledged by the said bank to secure the said deposits; (4) supervised the said depositary in all matters in connection with the said deposit and the keeping thereof in the said depositary under terms of section 5153 of the Revised Statutes of the United States.

Defendant denies each and every allegation contained in said paragraph "V" of the complaint not specifically herein admitted.

Wherefore, the defendant having fully answered demands that judgment be entered herein in its favor and that it go hence with its costs in this behalf expended and prays such other and further relief as to the court may seem just and equitable in the premises.

GEORGE STEPHAN,
*United States Attorney for*
*the District of Colorado.*
JOHN A. McCANN,
*Assistant United States Attorney*
*for the District of Colorado.*

[*Duly sworn to by Edward D. Batchelder. Jurat omitted in printing.*]

(Copy)

*Exhibit No. 1 to answer*

TREASURY DEPARTMENT.
*Washington, May 1, 1913.*

PRESIDENT FIRST NATIONAL BANK,
*Denver, Colorado.*

SIR: On and after June 1, 1913, the department will require all national-bank depositaries, both regular and inactive, to pay interest at the rate of two per cent per annum on the average monthly amount of public deposits held by them, such interest to be paid semiannually, January 1 and July 1 of each year.

Your bank is at the present time designated as an active depositary with a maximum balance of $300,000. Please advise the department at once whether you will desire to continue as a depositary with your present designated deposit under this new regulation as to the payment of interest.

If you should not care under the new conditions to remain a depositary for the full amount of your deposit, but should desire to retain on deposit a smaller portion of public funds which you are now authorized to hold, please notify the department promptly

the amount which you may desire to retain, and your request
17 will be given due consideration.

A prompt reply is requested.

By direction of the Secretary:

Respectfully,

(Signed) JOHN SKELTON WILLIAMS,
*Assistant Secretary.*

(Copy)

*Exhibit No. 2 to answer*

FIRST NATIONAL BANK OF DENVER, COLORADO,
*May 9, 1913.*

Hon. TREASURER OF THE UNITED STATES,
*Washington, D. C.*

SIR: I beg to acknowledge receipt of your notification dated May 1st to the effect that on and after June 1, 1913, this depositary will be required to pay semiannual interest at the rate of two per cent per annum on its average Government deposits. I appreciate the futility of entering an objection to this order and on behalf of my associates will be compelled to acquiesce.

In order that this business may present some elements of
18 profit, we hereby apply for as large an increase in Government deposits as can be allotted, it being reported to us that an amount equal to a twenty-five per cent increase in Government deposits is to be put out throughout the country for the purpose of satisfying national banks with the business. If such an amount is allotted to us we would then receive $75,000 additional deposits, and I take the liberty of calling your attention to the fact that within the last sixty days the department has reduced the Government deposits of this bank by the sum of $100,000, and I respectfully request that that amount at least be restored to us.

Awaiting the honor of your reply, I remain,

Yours respectfully,

(Signed) A. V. HUNTER,
*President.*

[File endorsement omitted.]

19 In United States District Court

[Title omitted.]

*Demurrer to answer*

Filed Nov. 22, 1924

Comes now the plaintiff and demurs to the answer of the defendant and for grounds thereof, shows the court:

That said answer does not state facts sufficient to constitute a defense to plaintiff's cause of action.

EDWIN H. PARK,
*Attorney for Plaintiff.*

In United States District Court

[Title omitted.]

*Minute entry of judgment*

Jan. 5, 1925

At this day comes the plaintiff, by Edwin H. Park, Esquire, its attorney, and the defendant, by Clarence L. Ireland, Esquire,
20 assistant district attorney, also comes.

And the demurrer to the answer herein coming on now to be heard is argued by counsel. And the court having considered the same and being now fully advised in the premises, it seemeth to the court now here that the answer herein is not sufficient in law to be replied unto, and so the said demurrer is hereby sustained.

And thereupon the plaintiff moves the court for the entry of judgment upon the pleadings herein, and the court having considered the same, and being now fully advised in the premises, the court doth assess the plaintiff damages against the defendant at the sum of five hundred seventy-one dollars and twenty-six cents ($571.26).

Wherefore it is considered by the court that the plaintiff do have and recover of and from the defendant the sum of five hundred seventy-one dollars and twenty-six cents ($571.26), its damages by it sustained by occasion of the premises in its complaint herein set forth and alleged in form aforesaid assessed, together with its costs by it in this behalf laid out and expended to be taxed.

21 In United States District Court

[Title omitted.]

*Judgment*

Jan. 5, 1925

On this fifth day of January, A. D. 1925, the same being one of the regular juridical days of the November term, A. D. 1924, of said court. Present: The Honorable J. Foster Symes, district judge.

Wherefore it is considered by the court that the plaintiff do have and recover of and from the defendant the sum of five hundred seventy-one dollars and twenty-six cents ($571.26), its damages by it sustained by occasion of the premises in its complaint herein set forth and alleged in form aforesaid assessed, together with its costs by it in this behalf laid out and expended to be taxed.

22 In United States District Court

[File endorsement omitted.]

[Title omitted.]

*Motion to set aside judgment*

Filed Feb. 5, 1925

Comes now the United States of America, defendant herein, through its attorneys, George Stephan, United States attorney for the District of Colorado, and Clarence L. Ireland, assistant United States attorney for the District of Colorado, and moves that the judgment heretofore entered in the above-entitled cause, on, to wit, the fifth day of January, A. D. 1925, be set aside, vacated, and held for naught for the following reasons:

1. That said judgment was entered upon the pleadings herein in violation of law.

2. That said judgment was entered upon the pleadings herein contrary to the procedure of law in such case made and provided.

3. That said judgment was entered by the court upon the pleadings herein and not in pursuance of a written opinion of the
23 court setting forth the specific findings by the court of the facts herein, and the conclusions of the court upon all questions of law involved in the case, in accordance with the procedure of law in such case made and provided, as more particularly set forth in Section 7, 24 Statutes 506, act of March 3, 1887, c. 359.

4. That it appears upon the face of the record that said judgment is contrary to law.

GEORGE STEPHAN,
*United States Attorney in and for the District of Colorado.*
CLARENCE L. IRELAND,
*Assistant United States Attorney in and for the District of Colorado.*

In United States District Court

[Title omitted.]

*Order denying motion to set aside judgment*

Feb. 10, 1925

At this day comes the plaintiff, by Edwin H. Park, Esquire, its attorney, and the defendant, by Clarence L. Ireland, Esquire,
24 assistant district attorney, also comes. And the motion to vacate the judgment heretofore entered herein, coming on now to be heard is submitted to the court. And the court having considered the same and being now fully advised in the premises:

It is ordered by the court that the said motion be, and the same is hereby denied.

In United States District Court

[File endorsement omitted.]
[Title omitted.]

*Findings of fact and conclusions of law*

Filed Feb. 11, 1925

The above cause having come on to be heard upon this 5th day of January, A. D. 1925, being one of the regular juridical days of the November, A. D. 1924, term of said court upon the demurrer
25 of the plaintiff to the answer of the defendant, and the court being sufficiently advised in the premises, doth find:

That the answer of the defendant, the United States of America, does not change the facts as stated in the opinion of the court heretofore and on the 31st day of July, A. D. 1924, filed herein, overruling defendant's demurrer to plaintiff's complaint and the court, therefore, finds the facts as therein stated.

The court further finds the law to be as stated in said opinion aforesaid and upon this demurrer of the plaintiff to defendant's answer adheres to the law as stated in said opinion and the demurrer of the plaintiff to the answer of the defendant is hereby sustained and the defendant declining to *to* answer further, judgment may be entered for the plaintiff and against the defendant upon these findings of fact and law.

It is further ordered that these findings of fact and law shall be filed as of the 5th day of January, 1925.

By the court:

J. FOSTER SYMES, *Judge.*

26 In United States District Court

[File endorsement omitted.]

[Title omitted.]

*Assignments of error*

Filed Mar. 27, 1925

Comes now the United States of America, defendant herein, through its attorneys, George Stephan, United States attorney for the District of Colorado, and Clarence L. Ireland, assistant United States attorney for the District of Colorado, and says:

That in the record of the proceedings in this case there is manifest error prejudicial to the rights of the defendant, and files the following assignment of errors upon which it relies, in this, to wit:

27 I

That the court erred in overruling defendant's demurrer to the complaint filed in the above-entitled cause, and ruling that said complaint was sufficient in law to be answered unto.

II

The court erred in sustaining the demurrer of the plaintiff to the answer of the defendant, and ruling that said answer was not sufficient in law to be replied unto.

III

The court erred in rendering and entering judgment upon the pleadings herein, for the reason that the act of Congress, approved March 3, 1887, sec. 7, 24 Stat. 506, specifically states that it is the duty of the court to cause a written opinion to be filed in the cause, setting forth specifically the findings by the court of the facts therein, and conclusions of the court upon all questions of law involved in the cause and to render judgment thereon.

IV

The court erred in ruling that the $15,143.92 deposited in Cause No. 6720, being the Minnesota Mutual Investment Company, vs. Victor G. McGirr, et al., was deposited by the clerk of the
28 court in the First National Bank in accordance with rule 20 of the court, under an agrement that said bank was to pay two per cent thereon, and which interest, according to the rule, became a part of the deposit.

V

The court erred in ruling that it could take judicial notice of its own relations with the bank, and the fact that a contract for interest existed between its clerk and the bank in question for the payment of interest under rule 20, of the district court for this district, and that said interest was paid to him to the time the arrangements was interefered with by the arbitrary and unauthorized action of the Secretary of Treasury.

VI

The court erred in ruling that no contract could exist between the bank and the defendant in respect to interest on the moneys in question, because the clerk deposited them in the bank under an order of the court, independent of the Secretary of Treasury.

VII

The court erred in ruling that the plaintiff had a cause of action against the defendant for the moneys in question.

VIII

The court erred in holding that plaintiff herein could
29 collaterally attack the contract then and there existing between the Secretary of Treasury and the First National Bank, a banking corporation, in the city and county of Denver, State of Colorado.

IX

The court erred in assessing plaintiff's damages against the defendant in the sum of five hundred seventy-one dollars twenty-six cents ($571.26).

X

The court erred in rendering and entering judgment in favor of the plaintiff herein against the United States of America for its costs by it in this behalf laid out and expended.

XI

That the judgment herein is contrary to the law in the case.

XII

That said judgment is contrary to the pleadings in the case.

XIII

That said judgment is contrary to the law and the pleadings in the case.

Wherefore, the defendant, the United States of America herein, prays that the order and judgment of the court en-
30 tered as aforesaid against it, may be wholly set aside, annulled and reversed and for naught held; that the cause be remanded to the said district court with directions to dismiss plaintiff's complaint herein; and for such other, further, and different relief to which it may be entitled.

Dated at Denver, Colorado, this 27th day of March, A. D. 1925.

GEORGE STEPHAN,
*United States Attorney for the District of Colorado.*

CLARENCE L. IRELAND,
*Assistant United States Attorney for the District of Colorado.*

31 In United States District Court

[File endorsement omitted.]

[Title omitted.]

*Præcipe for transcript of record*

Filed Jan. 23, 1925

To CHARLES W. BISHOP,
*Clerk, District Court of the United States:*

You are requested to prepare certified copies of the following records in your office in the above-entitled cause:

1. Complaint.
2. Affidavit of Edwin H. Park.
3. Demurrer to complaint.
4. Brief of defendant in support of demurrer to complaint.
5. Brief of plaintiff in answer to defendant's brief on a demurrer to complaint.
6. Opinion of court, filed July 31, 1924.
7. Decision of the court on the demurrer to the complaint.

32

8. Answer.
9. Demurrer to answer.
10. Decision of the court on the demurrer to the answer.
11. Entry of judgment rendered.
12. Exceptions saved on behalf of the United States attorney's office.

GEORGE STEPHAN,
*Attorney for the United States of America, Defendant.*

33 In United States District Court

[File endorsement omitted.]
[Title omitted.]

*Additional præcipe for transcript of record*

Filed Feb. 11, 1925

To CHARLES W. BISHOP,
*Clerk, District Court of the United States:*

You are requested to prepare certified copies of the following records in your office in the above-entitled cause:

1. Motion to vacate judgment.
2. Order thereon.
3. Findings of Fact and Conclusions of Law, filed February 11, 1925.

GEORGE STEPHAN,
*Attorney for the United States of America, Defendant.*
A. M. G.

34 In United States District Court

[File endorsement omitted.]

*Writ of error*

Filed Mar. 27, 1925

*The President of the United States of America, to the honorable, the Judge of the District Court of the United States for the District of Colorado, greeting:*

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you at the November term, 1924, thereof, between the Minnesota Mutual Investment Company, a corporation, and the United States of America, a manifest error hath happened, to the great damage of the said the United States of America, as by complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, at Washington, D. C., together with this writ, so that you have the said record and proceedings aforesaid at the city of Washington, D. C., and filed in the office of the clerk of the Supreme Court of the United States on or before the twenty-fifth day of April, A. D. 1925, to the end that the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, this 27th day of March in the year of our Lord one thousand nine hundred and twenty-five and of the independence of the United States the one hundred forty-ninth year. Issued, at office in the city and county of Denver, in said district, with the seal of the District Court of the United States for the District of Colorado, and dated as aforesaid.

CHARLES W. BISHOP,
*Clerk, U. S. District Court, District of Colorado.*

Allowed by
J. FOSTER SYMES.

35 *Return to writ of error*

[Omitted in printing.]

36 [Citation in usual form showing service on Edwin H. Park, filed Mar. 27, 1925, omitted in printing.]

37 [Clerk's certificate to foregoing transcript omitted in printing.]

In United States District Court

ile endorsement omitted.]
itle omitted.]

*Memorandum opinion*

Filed July 31, 1924

ıe plaintiff herein some years ago was a party to an action in court, and in the course thereof deposited with the clerk of the t certain monies to await the outcome of said suit. The latter, ccordance with rule 20 of the court, deposited the same in one he designated national banks, under an agreement with said sitary to pay two per cent interest thereon. This interest, acing to the rule, became part of the deposit.

t the termination of the litigation referred to the fund in question was returned to this plaintiff. In this action it seeks to recover from the United States the interest admittedly paid it on said sum by the bank, pursuant to certain regulations of the etary of the Treasury, promulgated in 1913. These purported to ire all Government depositaries to pay two per cent interest to Treasury of the United States on all Government deposits, ining court funds.

he demurrer now before the court asserts that the complaint not state a cause of action.

he Government contends that the Treasury regulations referred re authorized, and have the force of law, pursuant to section 5153 he Rev. Stats. But that section refers only to public monies, s not in point. Monies paid into court in causes pending ein and deposited in a designated depositary of the United States he clerk are not public monies. Branch v. U. S., 100 U. S., 673; dert v. U. S., 175 U. S., 178 U. S. v. MacMillan, 209 Fed. 266. rmed 251 Fed. 55. If sec 5153, supra, included court funds, e would be no necessity for secs. 995 and 996, Rev. Stats. The visions of these two sections refer to court funds exclusively, and ct that such funds be deposited either with the Treasurer of the United States or a designated depositary of the United States "in the name and to the credit of said court." Public funds as such are not referred to therein, thus disclosing the clear nt of Congress to distinguish between public monies and court ds. And, further, these sections are in harmony with rule 20, thus avoid a seeming conflict between the rule and sec. 5153, ra.

he Government cites Chatham & Phenix Nat. Bank v. Guary Trust Co., 256 Fed. 90, as decisive of the question. An examion of the case, however, discloses the fact that it does not supt its contentions. In that case it was sought to make a bank, which the clerk of the court had deposited monies, held subject to

the outcome of litigation, pay interest thereon to the party that was found entitled to the monies. The court, after holding that there was no jurisdiction over the bank, because it was not a party, said:

"And if it owed interest on the deposit, it owed it to the depositor, the clerk of the court, who alone had standing to collect the same."

Further, the court specifically declined to express an opinion on the question of whether the Secretary of the Treasury could by virtue of sec. 5153, Rev. Stats., require the depositary to pay interest to the United States upon balances, including monies deposited by courts, and found that there was no contract
41 between the bank and the clerk for the payment of interest on such deposit, and that the clerk had received none.

I think this court can take judicial notice of its own relations with the bank, and the fact that a contract for interest existed between its clerk and the bank in question, for the payment of interest agreeable to rule 20, and that the same was paid to him up to the time the arrangement was interfered with by the arbitrary and unauthorized action of the Secretary of the Treasury in promulgating the regulations referred to.

If I am correct so far it logically follows that the regulations of the Secretary of the Treasury referred to do not apply to the fund in question, and, further, that no contract could exist between the bank and the Government in respect to interest on these monies, because the clerk deposited them in the bank pursuant to an order of the court, independent of the Secretary of the Treasury, and the bank, therefore, received no consideration for the agreement to pay interest, referred to in the brief for the Government. This, however, is not necessary to a decision on the demurrer, because the contract is not now disclosed in the pleadings. Therefore, the Government, due to a mistake in law, has received something which in equity
42 and good conscience belon'ed to the plaintiff. The care with which such funds are guarded, and the rights of the owner thereof protected, is shown by the case of American Loan & Trust Co. v. Grand Rivers Co., 159 Fed. 775.

The demurrer is overruled, and the defendant may have thirty days to answer, in default of which judgment may be entered as prayed for.

J. FOSTER SYMES,
*District Judge.*

JULY 31, 1924.

43 [Clerk's certificate to foregoing paper omitted in printing.]

[Indorsement on cover:] File No. 31011. Colorado D. C. U. S. Term No. 348. The United States of America, plaintiff in error, vs. The Minnesota Mutual Investment Company. Filed April 8th, 1925. File No. 31011.

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JURISDICTION

The judgment of the District Court was entered January 5, 1925. (R. 8.) A writ of error was allowed on March 27, 1925 (R. 14), under Section 242 of the Judicial Code and Section 4 of the Tucker Act, Act of March 3, 1887, c. 359, 24 Stat. 505, 506 (both of which have since been repealed by the Act of February 13, 1925, c. 229, 43 Stat. 936, 941, 942). See *J. Homer Fritch, Inc.*, v. *United States*, 248 U. S. 458.

STATEMENT

This action was instituted by a complaint filed by the defendant in error in the District Court for the District of Colorado and is for the recovery from the United States of the sum of $571.26 paid to the United States by the First National Bank, of Denver, Colorado, as interest at the rate of two per cent per annum upon a sum of money which was deposited by the defendant in error in the registry of said court and by the clerk of said court deposited in said bank, and which sum of money was subsequently returned to the defendant in error. The case was disposed of in the District Court on a motion by the plaintiff for judgment on the pleadings. The court granted the motion and on January 5, 1925, entered judgment that the defendant in error recover the amount claimed in the complaint. (R. 8.)

In June, 1918, the defendant in error was a party to an action in the District Court of the

United States for the District of Colorado, and in the course thereof deposited with the clerk of the court to await the outcome of the action the sum of $15,143.92, which the clerk immediately deposited with the First National Bank of Denver, Colorado. At the termination of the litigation the fund was returned to the defendant in error. (R. 1, 15.)

The First National Bank had been theretofore designated by the court as one of its depositaries (R. 1, 15), and had also been designated as a Government depositary by the Secretary of the Treasury (R. 5, 15).

In May, 1913, the Secretary of the Treasury promulgated certain regulations which required all Government depositaries to pay two per cent interest to the Treasury of the United States on all Government deposits, including court funds, and the First National Bank agreed to pay such interest. (R. 5–7, 15.) Interest at the rate of two per cent on the sum of $15,143.92 during the period it was deposited, amounting in all to $571.26, was actually paid by the First National Bank to the Treasury of the United States. (R. 5, 15.)

The District Court took judicial notice "of its own relations with the bank, and the fact that a contract for interest existed between its clerk and the bank in question, for the payment of interest agreeable to rule 20, and that the same was paid to him up to the time the arrangement was interfered with by the arbitrary and unauthorized action of

the Secretary of the Treasury in promulgating the regulations referred to." (R. 16.) The court concluded that the defendant in error was entitled to recover from the Government the $571.26 paid to it as interest. (R. 16.)

Rule XX of the District Court is as follows:

> 1. All moneys brought into court shall be paid to the clerk of the court, unless the court shall otherwise direct, and when not immediately paid to the party entitled, be deposited by said clerk, in his name of office, with such depositary as may be designated by law, or by the court, when no place is so designated. The amount so received, the purpose for which it was paid into court, together with the fact of the deposit, as herein provided, shall be noted by the clerk in the civil or criminal dockets of the court in the particular cause in which it is received. All interest paid on said deposits shall become a part thereof.
>
> 2. Orders on depositaries for the payment of money from the registry of the court shall be signed by the clerk, and countersigned by a judge of the court.
>
> 3. The First National Bank of Denver, The Colorado National Bank of Denver, and The Denver National Bank of Denver are made depositaries for such funds.

The Treasury Regulations in force from June, 1918, to May, 1920, are printed in the Appendix.

Section 5153 of the Revised Statutes, as amended by various later acts, under which the Treasury

Regulations above referred to were issued, is as follows:

> All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: *Provided*, That the Secretary shall, on or before the first of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks: *Provided*, That the Secretary of the Treasury shall distribute the deposits herein provided for, as far as practicable, equitably between the different States and sections.

Section 995 of the Revised Statutes is as follows:

> All moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the Treasurer, an assistant treasurer, or a designated depositary of the United States, in the name and to the credit of such court: *Provided,* That nothing herein shall be construed to prevent the delivery of any such money upon security, according to agreement of parties, under the direction of the court.

The answer of the plaintiff in error alleged that in consideration for the payment by the First National Bank of the interest, aggregating $571.26, the plaintiff in error, among other things, kept safe in its custody the collateral security pledged by the bank to secure the deposit and supervised the depositary in all matters in connection with the deposit and the keeping thereof in the depositary. (R. 6.)

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED

The District Court erred in holding that the United States was not entitled to interest on deposits of court funds and in holding that it had jurisdiction.

**SUMMARY OF ARGUMENT**

I. The regulation or contract under which the First National Bank paid interest to the United States was a valid regulation pursuant to Section

5153 of the Revised Statutes. A depositary of public money designated pursuant to that section automatically becomes an authorized depositary of court funds under Section 995 of the Revised Statutes, and regulations issued under the former section should therefore provide for court funds as well as for public money.

II. The claim of the defendant in error is one of which the District Court had no jurisdiction. There was no contract, express or implied in fact, by the plaintiff in error to pay over to the defendant in error the interest received by it; the claim of the defendant in error, if any, is one upon a contract implied in law, for which the Tucker Act does not give a right of action against the United States.

## ARGUMENT

### I

### THE REGULATION OR CONTRACT UNDER WHICH THE FIRST NATIONAL BANK PAID INTEREST TO THE UNITED STATES IS VALID

Section 5153 of the Revised Statutes, as amended, provides that "All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary * * *." The District Court held that this section refers only to public moneys, so is not in point, since moneys paid into court in causes pending therein and de-

posited in a designated depositary of the United States by the clerk are not public moneys. (R. 15.)

It is true that the only power of designation given to the Secretary of the Treasury by the section is that of designating depositaries of public money. But it does not follow that the regulations which the Secretary of the Treasury may prescribe are limited to such as are necessary to protect the public moneys deposited and can not take into consideration other conditions which arise by virtue of a designation as a depositary of public moneys.

Section 995 of the Revised Statutes requires money paid into any court of the United States to be deposited with the Treasurer, an Assistant Treasurer, or a designated *depositary of the United States*, with the proviso that such money may be delivered upon security, according to agreement of parties under the direction of the court. The words "depositary of the United States" must mean a depositary of public money. Therefore, while the Secretary of the Treasury can not directly designate a depositary of court funds, his designation of a depositary of public money will automatically, by virtue of Section 995, make the national banking association so designated also an authorized depositary of court funds.

Under these circumstances the regulations prescribed by the Secretary of the Treasury pursuant

to Section 5153 should provide for the handling and protection of court funds deposited with designated depositaries of public money, as well as for the handling and protection of public money. Consequently, the plaintiff in error kept safe collateral security deposited with it to secure the deposit of the court funds with the First National Bank, and supervised the bank in all matters in connection with the deposit and the keeping thereof. (R. 6.) That in connection with the performance of this service it required the payment of interest to it at the rate of two per cent does not seem to be unreasonable or beyond the power of the Secretary of the Treasury under Section 5153. This requirement did not prevent the court, or the parties to the litigation, from making such arrangements for additional interest as they were able. No banking association was compelled to accept a designation as a depositary of public money upon the terms fixed by the Secretary of the Treasury. And if the parties or the court did not desire to take advantage of the facilities offered by the Treasury Department in the designation and regulation of a depository of public money, they could probably have agreed to deliver the money deposited in court on security, pursuant to the proviso to Section 995.

It seems, therefore, that the requirement by the Treasury Department that the First National Bank pay the United States interest at the rate of two per cent upon the court funds deposited with

it was a reasonable regulation and within the authority granted by Section 5153 of the Revised Statutes.

In the consideration of these regulations the thought suggests itself that they may be construed so as to permit the payment of interest to a litigant whose money is deposited for safe-keeping, and that the requirement that interest on "court funds" be paid to the United States was not intended to relate to the funds of litigants so deposited. The Treasury Department has construed them to cover such funds and we have accordingly dealt with the case on that basis.

## II

### THE CLAIM OF THE DEFENDANT IN ERROR IS NOT ONE OF WHICH THE DISTRICT COURT HAD JURISDICTION

The only justification for bringing this case to this Court is to obtain a decision on the question whether the Treasury regulation is valid which requires payment to the United States of interest on deposits of court funds. We desire to waive every other point in the case which properly may be waived.

There is a question whether, in any view of the case, the defendant in error could do more than recover interest from the bank. That point is laid aside.

There is a question of jurisdiction of the District Court, however, which may not be waived.

It is clear that there was no contract, express or implied in fact, by the plaintiff in error to pay over to the defendant in error the interest received on the $15,143.92 deposited in the First National Bank. The Treasury regulation requiring payment to the Treasury of interest on Government deposits, including court funds, was for the benefit of the United States, not for the benefit of the persons ultimately found to be entitled to the funds deposited. This was expressly held in *Chatham & Phenix National Bank* v. *Guaranty Trust Co.* (C. C. A. 2nd Circuit), 256 Fed. 90, certiorari denied 250 U. S. 642, in which the court speaking of the regulation in question, said (p. 92):

> The contention that this regulation or contract does not contemplate the payment of the interest to the United States, but to whomsoever it may be due, does not impress us. Obviously the Secretary of the Treasury requires payment of it to him and the United States attorney appears in this case as amicus curiae, contending that the interest does belong to the United States.

In the District Court the defendant in error did not contend that there was any contract, express or implied in fact, under which it was entitled to the interest in question, but based its claim upon the proposition that " where one has received money which in equity and natural justice belongs to the plaintiff he may maintain a suit therefor, as upon

an implied contract, and it is not necessary that there be any actual contractual relation." The District Judge based his decision upon his conclusion that there was a contract between the clerk of the court and the bank for the payment of interest; that this arrangement " was interfered with by the arbitrary and unauthorized action of the Secretary of the Treasury in promulgating the regulations referred to "; and that " the Government, due to a mistake of law, has received something which in equity and good conscience belonged to the plaintiff." (R. 16.) The theory of both the defendant in error and the District Judge was that as the Government had improperly received money to which it was not entitled, recovery could be had upon a contract implied in law.

This view entirely disregards the settled rule that " to give the Court of Claims jurisdiction the demand sued on must be founded on a convention between the parties—'a coming together of minds.' " *Russell* v. *United States*, 182 U. S. 516, 530.

A case very similar to the present one is *Merritt* v. *United States*, 267 U. S. 338. There the Court said (p. 340):

> Plaintiff can not recover under the Tucker Act, Judicial Code, §145, 24 Stat. 505. The petition does not allege any contract, express or implied in fact, by the Government with the plaintiff to pay the

> latter for the khaki on any basis. Nor does it set forth facts from which such a contract will be implied. The pleader may have intended to sue for money had and received. But no facts are alleged which afford any basis for a claim that the repayment made by the Mills was exacted by the Government for the benefit of the plaintiff. The Tucker Act does not give a right of action against the United States in those cases where, if the transaction were between private parties, recovery could be had upon a contract implied in law.

See also *Pearson* v. *United States*, 267 U. S. 423.

In the complaint the defendant in error alleged that the cause was founded upon a regulation of an executive department of the United States Government. (R. 1.) This is a mere conclusion which finds no support in the facts. A claim is not founded upon a law or a regulation of an executive department within the meaning of the Tucker Act unless the law or the regulation itself creates the obligation. See *Campbell* v. *United States*, 107 U. S. 407; *Hooe* v. *United States*, 218 U. S. 322; *United States* v. *Hvoslef*, 237 U. S. 1; *United States* v. *Laughlin*, 249 U. S. 440; *Great Western Serum Company* v. *United States*, 254 U. S. 240. The claim in the present case, far from being founded on the Treasury regulation requiring the payment of interest, is founded upon the asserted invalidity of that regulation.

## CONCLUSION

The judgment of the District Court should be reversed.

WILLIAM D. MITCHELL,
*Solicitor General.*

GARDNER P. LLOYD,
*Special Assistant to the Attorney General.*

MAY, 1926.

# APPENDIX

TREASURY DEPARTMENT,
*Washington, April 30, 1913.*

Secretary McAdoo announced to-day that, beginning June 1, 1913, all Government depositaries, both active and inactive, will be required to pay interest at the rate of two per cent per annum on average monthly balances, to be credited semi-annually January 1 and July 1 of each year.

The Secretary states that, under Section 5153 of the Revised Statutes, national banks which have been or may be designated as Government depositaries, instead of placing with the Treasurer, as security for deposits, as heretofore, bonds exclusively of the United States or of the provincial Governments for the full amount of their deposits, will hereafter be allowed to secure seventy per cent of such deposits with Government bonds of the above classes and the remaining thirty per cent, at the election of the depositary bank, either with similar Government bonds at par or with high-class State, city, and county bonds, acceptable to the Secretary of the Treasury, to be taken as security at seventy-five per cent of their market value, but not to exceed par.

The Secretary has to-day authorized the transfer from the Treasury to national bank depositaries in different sections of the country of $10,000,000,

in addition to the $42,649,964, which the Treasurer of the United States already has to his credit in the various national banks.

With the banks paying interest on Government deposits, the Secretary may be justified in keeping larger balances in the national banks, thereby increasing the volume of money in circulation, and to that extent reducing the amount locked up in the Treasury.

The balance to the credit of the Treasurer of the United States in the national bank depositaries at the close of business yesterday amounted to $42,649,964, and with the $10,000,000, which the Secretary proposes to deposit, the total amount of such Government funds with national banks will be increased to $52,649,964.

The free balance in the general fund, including funds in the Treasury of the Philippines and in the national banks, amounted, at the close of business yesterday, to $141,025,263.

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THE COLLECTION OF INTEREST ON PUBLIC DEPOSITS

TREASURY DEPARTMENT,
OFFICE OF THE TREASURER
OF THE UNITED STATES,
*Washington,*

With reference to the announcement of the Secretary of the Treasury, under date of April 30, 1913, that, beginning with June 1, 1913, all Government depositaries, both active and inactive, will be required to pay interest at the rate of 2 per cent per annum on average monthly balances, payable on January 1st and July 1st of each year, by au-

thority of the Secretary of the Treasury the regulations for the computation and collection of this interest will be as follows:

The balance on which interest will be required will include the total of the balances to the credit of the Treasurer of the United States, postmasters, United States courts and clerks of courts, and United States disbursing officers, if there be any.

Each bank will furnish the Treasurer with a sworn statement of its daily balances at the end of each month; the total of these daily balances divided by 30 will give the average balance held for the month, and the total of these six average balances divided by 6 will give the average monthly balance for the six months.

Interest will be computed on this average monthly balance for the full period of six months, or on the average for any part of the period for which the balance is held. The interest may be deposited with the Treasurer or any Assistant Treasurer of the United States or any active designated depositary bank.

Respectfully,

JOHN BURKE, *Treasurer.*

REGULATIONS GOVERNING DEPOSIT OF PUBLIC MONEYS AND PAYMENT OF GOVERNMENT WARRANTS AND CHECKS

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
*Washington, December 31, 1919.*

1919

Department Circular No. 176

Public Moneys

*To the Treasurer and Assistant Treasurers of the United States, Federal Reserve Banks, National Bank Depositaries, Special Depositaries of Public Moneys, Collectors of Internal Revenue, Collectors of Customs, Receivers of Public Moneys, Depository Postmasters, Marshals and Clerks of Courts, all other Officers or Agents of the United States engaged in collecting, depositing, or transmitting public moneys, and others concerned:*

DEPOSIT OF PUBLIC MONEYS

1. All public moneys shall be deposited with the Treasurer of the United States, Federal Reserve Banks and branches, Assistant Treasurers of the United States, and regular National bank depositaries, and, as provided in paragraph 3 hereof, with special depositaries under the act approved September 24, 1917, as amended and supplemented, all in accordance with the provisions of this circular and subject to the exceptions hereinafter provided. All deposits of public moneys hereunder (except with such special depositaries) shall be for credit to the account of the Treasurer of the United States. The term " Federal Reserve Bank " where it appears in this circular, unless

otherwise indicated by the context, includes branch Federal Reserve Banks with which deposits are authorized to be made. All collectors, receivers of public moneys of every description, and other persons having public money to pay to the United States are hereinafter sometimes called depositors of public moneys.

GENERAL PROVISIONS AS TO DEPOSITARIES

2. *Classes of depositaries.*—The established policy of the Treasury Department is to designate and maintain balances with regular National bank depositaries of public moneys only at points where a depositary is necessary to meet the requirements of Government officers for cash for pay-roll or other expenditures, and then only if there is no Federal Reserve Bank or branch located at or near the point. National banks when designated by the Secretary of the Treasury, however, may be depositaries of public moneys with a maximum qualification, for the sole purpose of receiving deposits made by United States courts and their officers, by postmasters, or by other duly authorized Government officers, for credit to their official disbursing accounts elsewhere than with the Treasurer of the United States, provided that such depositaries qualify, before receiving deposits, by pledging as collateral security for such deposits, including interest thereon, securities of the classes described in paragraph 26 hereof, to an amount, taken at the rates therein provided, at least equal to such deposits. National bank depositaries designated with a maximum qualification for this purpose alone are not thereby authorized to accept

any other deposits hereunder. Deposits arising from the proceeds of sales of bonds, notes, and Treasury certificates of indebtedness of the United States, and the payment of income and profits taxes, may be made from time to time with special depositaries of public moneys under the act of Congress approved September 24, 1917, as amended and supplemented. Other deposits of public moneys are maintained with the several Federal Reserve Banks, pursuant to the provisions of Section 15 of the Federal Reserve Act, as amended. All inactive National bank depositaries are being discontinued, pursuant to action already taken by the Secretary of the Treasury.

3. *Special depositaries.*—Any incorporated bank or trust company in the United States desiring to participate in deposits of public moneys arising from the sale of bonds, notes, or Treasury certificates of indebtedness of the United States, or from the payment of income or profits taxes, under Section 8 of the act approved September 24, 1917, as amended and supplemented, may make application for designation as a special depositary of public moneys to the Federal Reserve Bank of its district, pursuant to Treasury Department Circular No. 92, as from time to time amended and supplemented. Detailed regulations governing such depositaries are prescribed in said circular, to which reference is hereby made. The remaining provisions of this circular do not apply to or govern special depositaries under said circular, and such depositaries are not, by virtue of such designation or their qualification thereunder, authorized to accept deposits hereunder from collectors or

other depositors of public moneys for credit to the account of the Treasurer of the United States, or to the official disbursing accounts of Government officers.

* * * * *

17. *For special attention of officers of United States courts and United States attorneys.*—United States attorneys, marshals, and clerks of United States courts, who receive public moneys accuring to the United States from fines, penalties, and forfeitures, fees, costs, forfeitures of recognizances, moneys arising from unclaimed wages and effects of seamen that have remained in the registry of the courts for more than six years, unclaimed moneys remaining in court registry five years or longer, debts due the United States, interest on such debts, sales of public property, or from any other sources, except as stated below, will deposit the same in accordance with the foregoing paragraphs. Moneys collected in cases for violation of customs, navigation, equipment of motor boats, steamboat-inspection, immigration and Chinese exclusion laws should be paid to the collector of customs in the district or port in which the case arose. Fines for importation of opium or having opium in possession under act of February 9, 1909, amended January 17, 1914, should also be paid to the collector of customs. Moneys collected in criminal cases under the internal revenue laws, including fines for making smoking opium under law of January 17, 1914, or under the anti-narcotic act of December 17, 1914, should be paid to the collector of internal revenue in the district in which the case arose. But fines arising from violation of section 240, Criminal

Code, should be deposited by the clerk of court collecting same to the credit of the Treasurer of the United States. Moneys collected as damages on account of trespass on the national forests should be paid to the fiscal agent of the forest service district in which the case arose. Fines and costs should be deposited to the credit of the Treasurer of the United States. Fines collected under sections 52 and 53, Criminal Code (setting fire to timber on public lands or failing to extinguish same), should be paid to the proper county officer for the public school fund of the county where the land is situated. Costs should be deposited to the credit of the Treasurer of the United States. Moneys collected in Inlian suits involving rentals, leasing, damages, etc., of Indian property or allotments for use of the particular Indian owners, should be paid to the disbursing officer for the agency having jurisdiction over them. Costs should be deposited to the credit of the Treasurer of the United States. Moneys (including costs) collected in civil or criminal post-office cases should be transmitted to the Solicitor of the Treasury, by draft or check, made payable to the order of the Treasurer of the United States.

* * * * * * *

27. *Court and post-office funds, etc.*—National bank depositaries designated with a maximum qualification for the sole purpose of receiving deposits made by United States courts and their officers, by postmasters for credit to their official disbursing accounts, and by other Government officers authorized to maintain disbursing accounts elsewhere than with the Treasurer of the United

States are not authorized to receive deposits for credit to the account of the Treasurer of the United States. Such depositaries are required to forward to the Treasurer of the United States at the end of each week, and at the end of each month, a report on Form 17 (National Banks), showing the aggregate amounts of such deposits, and to the Secretary of the Treasury, Division of Public Moneys, at the end of each week, and at the end of each month, a report on Form 7 (National Banks), showing in detail the deposits to the credit of the local postmaster, the United States court or its officers, and other authorized special accounts. Bankruptcy funds and postal-savings deposits should not be included in these reports.

28. *Interest on deposits.*—Each National bank depositary will be required to pay interest at the rate of 2 per cent per annum on daily balances, including deposits received pursuant to paragraph 27 hereof. Interest will be calculated on an actual days' basis, and shall be paid semiannually on January 1 and July 1 in each year, 1 per cent for each six-months' period.

* * * * * * *

OTHER PROVISIONS

32. All previous regulations and instructions inconsistent herewith are hereby superseded, including, so far as inconsistent herewith, the provisions of Treasury Department Circulars No. 5, dated April 6, 1916, No. 105, dated December 27, 1917, and No. 144, dated May 20, 1919.

33. *Except as herein otherwise specifically provided, nothing contained in this circular shall be*

*deemed to affect* deposits by postmasters to the credit of their official disbursing accounts, *the deposit of court funds by United States courts and their officers,* or the deposit of postal-savings funds, in cases where such deposits are not for credit by the depositary in the account of the Treasurer of the United States. Unless specifically extended thereto by the Secretary of the Treasury, nothing contained in this circular shall be deemed to apply to or govern the deposit of public moneys in Federal land banks or joint-stock land banks under the act approved July 17, 1916, as amended. (Italics ours.)

34. The provisions of this circular do not apply to or govern the deposit of public moneys or the payment of Government warrants and checks outside of the continental United States, except to the extent specifically extended by the Secretary of the Treasury from time to time.

35. The Secretary of the Treasury may withdraw or amend at any time or from time to time any or all of the provisions of this circular.

CARTER GLASS,
*Secretary of the Treasury.*

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### *STATUTES*


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# In the Supreme Court of the United States.

OCTOBER TERM, 1925

No. 348

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR.

vs.

THE MINNESOTA MUTUAL INVESTMENT COMPANY, DEFENDANT IN ERROR.

In Error to the District Court of the United States for the District of Colorado.

## STATEMENT OF FACTS.

This action was brought to recover interest paid to the United States on a deposit by defendant in error, under order of court, of $15,143.92 in the registry of the United States District Court of Colorado, on June 17, 1918. The money was deposited by the Clerk in the registry fund in the First National Bank at Denver, and remained there to the credit of the Court as provided by Section 995 R. S. U. S., until

May 6, 1920, when the litigation being ended, the principal was returned to defendant in error.

Rule 20 of the Trial Court, referred to and brought into this Court in the assignments of error, required the depository bank to pay interest on the fund, to be added to the principal.

However the Secretary of the Treasury, in 1913, promulgated a rule or regulation, requiring all Federal depositaries to pay to the Treasury interest on all public funds, including moneys deposited in the registaries of Courts, and the bank paid the interest on our money into the Federal Treasury.

Attached to the answer is a letter from the Treasury Department addressed to the bank, marked Exhibit 1 (Record page 7), which directs the bank to pay interest on "public deposits." The reply from the bank (Record page 7) consents to pay on "Government deposits." The answer goes further and alleges "all Government deposits, including court funds." (Record page 5, Fol. 13.)

The Government alleges the authority to collect this interest is conferred on the Secretary of the Treasury by the laws of the United States.

A general demurrer to the complaint was overruled and a written opinion filed (Record page 15). The United States then filed its answer to which the defendant in error filed a general demurrer, which was sustained, the Court filing a written opinion as findings of fact and conclusions of law, and referred specifically as a part thereof to the former decision (Record page 10). Judgment was thereupon entered for $571.26.

The case was then removed to this Court by the plaintiff in error.

## ARGUMENT.

The argument of the plaintiff in error is based entirely upon Section 5155 of the Revised Statutes of the United States, which provides for the designations of depositaries of *public moneys* of the United States.

The Act of May 30, 1908 (35 Stat. 552) provides for rates of interest upon public funds deposited in such depositaries. Sec. 995 of Revised Statutes provides that moneys paid into the registry are to be deposited with the Treasurer of the United States or in a designated depositary of the United States in the name and to the credit of the Court.

Section 996 provides the same may be withdrawn by the Court, etc.

The complaint charges that the money in controversy here was deposited in a depositary designated by the Court and not a depositary designated by the Secretary of the Treasury. This money was private funds and not public money. It was money in *custodia legis* and held subject only to further orders of the Court.

Section 251 R. S. provides that the Secretary of the Treasury may make rules and regulations relative to public moneys and officers concerned therewith and it is now claimed that the rules and regulations of the Secretary of the Treasury promulgated in 1913 requiring interest to be paid into the Treasury upon all moneys deposited in registries of the Court have the form, force and power of the statutes of the United States.

This result may be true when the subject matter is within the jurisdiction and within the letter of some statute but there is no statute permitting any

officers of the United States to subject the interest accruing upon private funds to denomination by the United States or requiring the same to be confiscated because the funds happen to be deposited in the registry of the Court.

Judge Sanborn of this Circuit, in the case of United States v. 11,150 Pounds of Butter, 195 Fed. 657, 663, said:

> "Implied authority in an executive officer or department to repeal, extend, or modify an act of Congress may not be lawfully inferred from authority to enforce it, and a regulation of the Secretary of the Treasury, or any other executive officer, made under legislative authority to make rules to enforce an act of Congress, which has the effect to subject classes of property to forfeiture and classes of persons to fines and penalties under the act, that are excluded therefrom by the terms of the law, is unauthorized and void."

This Court In re Tyler 149 U. S. 164, where executive officers attempted to collect taxes by the distraint of property in the hands of the receiver, the Court said at page 183:

> "The maintenance of the system of checks and balances characteristic of republican institutions requires the coordinate departments of government, whether federal or state, to refrain from any infringement of the independence of each other, and the possession of property by the judicial department cannot be arbitrarily encroached upon, save in violation of this fundamental principle."

Dayton v. Pueblo Co., 241 U. S. 588.

The same rule applies to the case at bar when the Unted States thru its executive officers attempts to collect interest upon moneys in the hands of the Court.

The Government contends there is no contract here, either express or implied, and therefore the complaint does not state a cause of action. The rule is both in Federal and State Courts that where one has received money which in equity and natural justice belongs to the plaintiff he may maintain a suit therefor, as upon an implied contract, and it is not necessary that there be any actual contractual relation.

Lipman, Wolf & Co. v. Phoenix Assur. Co., 258 Fed. 544;
Gaines v. Miller, 111 U. S. 395-7;
Hill v. U. S., 149 U. S. 593, 598;
Merchants' & Miners' Bank v. Barnes, 18 Mont. 335;
Ela v. Express Co., 29 Wis. 611, 617;
Klebe, et al. v. U. S., 263 U. S. 188.

Assumpsit will lie whenever defendant has received money which is the property of the plaintiff and where the defendant is entitled by natural justice and equity to a refund.

Bayne, et al. v. U. S., 93 U. S. 643;
U. S. v. State Bank, 96 U. S. 30, 35.

In Omnia Co. v. U. S., 261 U. S. 502, 510, the Court said:

> "If under any power, a contract or other property is taken for public use the Government is liable."

Therefore, if this interest collected by the Government and paid into its treasury was not property of the United States but belonged to the fund deposited then under the foregoing authorities the United States is liable to the plaintiff under an implied contract.

In U. S. v. Mosby, 133 U. S. 273, 286, the Court held that interest recovered upon public moneys deposited in a bank belonged to the fund and, consequently, was the property of the United States. Interest is an accretion or increment of the fund and interest on a fund deposited in Court belongs to the fund.

Rhea v. Brewster, 130 Ia. 729;
South Oregon Co. v. Gage, 100 Oreg. 424;
In Re Macky's Estate, 73 Colo. 1, 7;
State v. Crook County Bank, 104 Oreg. 495;
Central Trust Co. v. New Amsterdam G. Co., 167 Fed. 983;
18 C. J. 775.

Notwithstanding the money was deposited in a designated depositary designated by the Court and not by the Secretary of the Treasury these moneys were not public funds and, therefore, did not come within the purview of the regulations of the Secretary. He could not control it without violating the Federal constitution and his attempt to control it and require the payment of interest to the Treasurer was absolutely void so far as this money is concerned.

In Branch v. U. S. 100 U. S. 673 it was claimed that moneys, the proceeds of seized cotton deposited in a designated court depositary were public moneys, and after the failure of the bank it could be claimed as a preferred obligation. The Court held that

moneys deposited in the registry of the Court were not public moneys of the United States and no one could be charged with liability for moneys which were not public funds, notwithstanding they were deposited in a designated depositary by the Clerk of the Court. Moneys in that case belonged to the Court and were simply held as a trust fund pending the litigation.

To the same effect is Coudert v. U. S., 175 U. S. 178.

In U. S. v. Ferguson, 78 Fed. 103, a man arrested charged with robbing a post office. Among other moneys taken from him was $50.60 which was his own money but was turned into the Treasury of the United States. The Court of Appeals of the Second Circuit held that it was not public money and that a suit would lie to recover it.

In Brooks v. Kerr, 223 Fed. 1016, the Fourth Circuit Court of Appeals held that a fund paid into the registry of the Court bearing interest, the owner of the fund was entitled to recover such interest as may have been collected by the Court on the fund.

In U. S. v. McMillan, 253 U. S. 195, suit was brought by the United States against McMillan, Clerk of the Federal Court in Chicago, to recover interest paid to the Clerk by the banks upon unearned portions of docket fees paid into the Clerk's office by litigants.

The opinion of the Trial Court will be found in 209 Federal, page 266. The opinion of the Circuit Court of Appeals of the Seventh Circuit in 251 Federal 55.

The Government contended that all moneys deposited by the Clerk upon which interest was allowed

were public moneys of the United States and therefore, the interest belonged to the United States. The other contention was that it was an emolument of the Clerk and therefore, belonged to the Government. In each of the courts the Government contended that interest was an increment of ownership of the money. After citing cases of U. S. v. Mason, 218 U. S. 517 and U. S. v. Hill, 120 U. S. 169 where the nature of the moneys in the hands of the Clerk were determined and held not to be public moneys, the Court at page 204 said:

> "Conclusively disposing as these cases do of the contention of the Government as to public moneys of the United States, it leaves only for consideration the question of whether the interest on the sum of the fees and emoluments deposited by the clerk in bank was in and of itself an emolument for which he was liable to account. But that question is virtually also foreclosed in view of what was held in the Mason case, since the individual character of the bank deposit as there defined and the right to make it *necessarily causes the increment of such deposit, that is, the interest, to partake of the character of the principal.*"

If it partakes of the character of the principal, then it is a part of the principal and the Government has no right or authority in the premises and is holding our money which in equity and good conscience it should repay.

I particularly call the Court's attention to the case of South Oregon Co. v. Gage, 100 Oreg. 424, a decision by the Supreme Court of Oregon where moneys paid into the registry of the Court were re-

uired, under the laws of Oregon to be deposited with he treasurer of the county who in turn deposited the noney in bank in a general account upon which the ank paid interest which was covered into the treas- ry of the county. It was held by the Oregon Court hat interest to whomsoever paid belonged to the own- r of the fund, the owner had a right to maintain a uit to recover it. The bank had not agreed to pay in- erest but in fact did pay it and it was required to urn over as a voluntary payment but only as to the mount actually paid. The argument of the Court elative to the point here in issue will be found on ages 279 and 280 of that report, and while the deci- ion of the State Court is not binding upon this Court, yet it is persuasive and in connection with the Federal cases, is conclusive.

Rule 20 of the Trial Court provides that all in- erest paid on deposits shall become part thereof. In- erest was paid on this deposit and under the rule be- omes a part of the fund. Rules of Court have the orce and effect of law.

> Rio Grande Irrig. Co. v. Gildersleeve, 174 U. S. 603, 608.

The Clerk of the Trial Court for years prior to 913 had a contract with the banks to pay interest pon all funds deposited in the bank which had been aid into the registry of the Court. I contend that his being the case, it is not necessary to plead the ontract of the clerk but under Rule 20, where inter- st was in fact paid, it became a part of the fund. The contract of the clerk was a contract made for the enefit of third parties and such contract may be en- orced by a party for whose benefit it is made.

> Hendrick v. Lindsay, 93 U. S. 143.

Upon the record, I submit that the judgment entered was correct and that the Trial Court committed no error.

Respectfully submitted,

EDWIN H. PARK,
Attorney for the Defendant in Error.

# SUPREME COURT OF THE UNITED STATES.

No. 348.—October Term, 1925.

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| The United States of America, Plaintiff in Error, *vs.* The Minnesota Mutual Investment Company. | In Error to the District Court of the United States for the District of Colorado. |

[May 24, 1926.]

Mr. Chief Justice Taft delivered the opinion of the Court.

The Minnesota Mutual Investment Company is a corporation of South Dakota, doing business in Colorado. It sued the United States for $571.26, under the Tucker Act, Judicial Code, § 24, par. 20. Its claim arises under the following circumstances. In a cause pending in the United States District Court for Colorado, the Investment Company was plaintiff, and McGirr and others were defendants. The plaintiff was required to place in the registry of the court $15,143.92, which the clerk of the court immediately deposited in the First National Bank of Denver, Colorado, designated by the court as one of its depositaries. The money remained in the bank to the credit of the court from June 7, 1918, until May 6, 1920, when it was returned to the Investment Company. During that period the bank paid interest on this deposit of 2 per cent. per annum, semi-annually into the United States Treasury for the use of the Government. The petition alleges that for a long series of years prior to this, interest paid by the bank on such court funds had been added to the deposit for the benefit of the party adjudged to own it, but that shortly before this deposit, the Secretary of the Treasury, by regulation, required all United States depositaries having court funds to pay interest at 2 per cent. to the Treasurer of the United States for its use.

The petition avers that the United States was not interested in the sum of money so deposited, had no right, title, or interest

therein directly or indirectly, and that the interest so paid was and is the property of the plaintiff and was received by the United States for the use and benefit of the plaintiff, and judgment was asked therefor.

The United States filed a demurrer to the complaint, which was overruled. It then answered alleging that the United States through its proper officers had entered into a contract concerning the payment of interest upon all government deposits, including the court funds, carried with the bank by virtue of its designation as a depositary of the United States, under the regulations promulgated by the Secretary of the Treasury under authority conferred upon him by the laws of the United States; that this contract consisted of an offer made on behalf of the United States and its acceptance by the First National Bank by its President; and that accordingly $571.26 was paid to the United States by the Bank; that in consideration of such payment, the United States allowed the bank the use of all government deposits held on deposit; allowed the bank the prestige and advertising connected with its handling of such government deposits; kept safe in its custody the collateral security pledged by the bank to secure the deposits; and supervised the depositary in all matters in connection with the deposit. Accompanying the answer was the correspondence claimed to embody the contract between the United States and the bank. A demurrer to the answer of the defendant was sustained, and the judgment for $571.26 followed. Direct appeal to this Court was allowed to the United States under the Tucker Act (Act of March 3, 1887, Secs. 4 and 9, c. 359, 24 Stat. 505), because taken before the taking effect of the Act of February 13, 1925. (43 Stat. 936, c. 229, Sec. 14.)

Section 995 of the Revised Statutes provides:

"All moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the Treasurer, an assistant treasurer, or a designated depositary of the United States, in the name and to the credit of such court: Provided, That nothing herein shall be construed to prevent the delivery of any such money upon security, according to agreement of parties, under the direction of the court."

Rule 20 of the rules of the District Court of Colorado contains the following:

"1. All moneys brought into court shall be paid to the clerk of the court, unless the court shall otherwise direct, and when not immediately paid to the party entitled, be deposited by said clerk, in his name of office, with such depositary as may be designated by law, or by the court, when no place is so designated. The amount so received, the purpose for which it was paid into court, together with the fact of the deposit, as herein provided, shall be noted by the clerk in the civil or criminal dockets of the court in the particular cause in which it is received. All interest paid on said deposits shall become a part thereof."

Section 251 of the Revised Statutes provides that the Secretary of the Treasury may make rules and regulations relative to public moneys and officers concerned therewith. Section 5153 of the Revised Statutes, as amended by later acts, provides in effect that all national bank associations designated for that purpose by the Secretary of the Treasury shall be depositaries of public money under such regulations as may be prescribed by the Secretary and they are to perform all such reasonable duties as depositaries of public money as may be required of them. The Secretary is to require them to give satisfactory security, by the deposit of United States bonds, for the safe keeping of the public money deposited with them.

The court below found that the Secretary of the Treasury had no power under these two sections to direct national banks to pay interest on deposits of court funds to the United States and that his authority to make such a regulation for interest extended only to public moneys, and not to court funds belonging to the parties to the litigation awaiting adjudication as to ownership or proper disposition. The conclusion of the court was that the United States had therefore received interest which should have been paid to the defendant in error, the Investment Company, and which it may recover from the United States.

But the Solicitor General argues that even if the United States had no right to collect the interest from the Bank, no cause of action was created in favor of the Investment Company against the United States for this illegal collection, that there was no contract of the Government, express or implied, by reason of that collection to pay it to the Investment Company, and that without this, no recovery can be had. This seems to us to be sound reasoning. An implied contract in order to give the Court of Claims

or a district court under the Tucker Act jurisdiction to give judgment against the Government must be one implied in fact and not one based merely on equitable considerations and implied in law. *Merritt* v. *United States*, 267 U. S. 338, 340, 341; *Tempel* v. *United States*, 248 U. S. 121; *Sutton* v. *United States*, 256 U. S. 575, 581. There is nothing in the averments in the pleadings in this case to show that the officers of the Government collected this interest or that it was received into the Treasury for the benefit of the Investment Company.

The judgment is

*Reversed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*